

IN GOOD CONSCIENCE

September 20, 2016

The Honorable Sylvia M. Burwell  
Secretary  
Centers for Medicare & Medicaid Services  
Department of Health and Human Services  
Room 445-G, Hubert H. Humphrey Building  
200 Independence Avenue, SW  
Washington, DC 20201

RE: Requests for Information: Coverage for Contraceptive Services, CMS-9931-NC  
Docket ID: CMS-2016-0123-0001

Dear Secretary Burwell,

On behalf of the majority of the more than 80 million Catholics in the United States—72 percent of whom support coverage for birth control in private or government-run plans<sup>1</sup> and more than 80 percent of whom believe that using contraception is a moral choice<sup>1</sup>—we applaud the Departments of Health and Human Services, Labor and Treasury (herein after “the Departments”) for seeking to protect religious freedom while preserving contraceptive coverage without cost-sharing for workers, students and dependents at religious nonprofit organizations and universities. However, we are concerned that the accommodation perpetuates a troubling trend of prioritizing illegitimate “religious liberty” claims of institutions over the true religious liberty rights and healthcare needs of individual workers and their dependents.

The exemption for “religious institutions” already leaves out too many women. This exemption should be replaced with the existing accommodation, if not eliminated entirely. Moreover, we call on the Departments to ensure that any accommodation for “religious organizations” is not expanding to prioritize the “rights” of institutions but rather continues to prioritize individuals’ privacy, religious liberty and healthcare rights. We urge the Departments to consider first and foremost the impact on employees’ health needs and rights to conscience and religious liberty when reviewing the final accommodation to ensure the benefit of this critical preventive health service is available for all.

### **Religious Liberty and Conscience Protections: Meant for the Individual**

Contraceptive coverage for each woman regardless of where she works respects employees’ individual rights—both of conscience and individual religious liberty. The contraceptive coverage requirements infringe on no one’s conscience, demand no one change her or his religious beliefs, discriminate against no woman or man, put no additional economic burden on the poor, interfere with no one’s medical decisions and compromise no one’s health. Individuals, after all, have consciences and religious liberty. Institutions do not.

**PRESIDENT**

Jon O’Brien

**BOARD OF  
DIRECTORS**

Daniel A. Dombrowski, *Chair*

Dawne Deppe

Janet Gallagher

Anka Grzywacz

John Lesch

Kate Ott

Anthony Padovano

Victor Reyes

Denise Shannon

Rosemary Radford Ruether,  
*Emerita*

Catholic teaching reflects this understanding by prioritizing respect for the individual conscience in matters of moral decision-making. Our Catholic tradition also calls on us to honor religious liberty, which honors individuals' rights to both the freedom of religion, along with the freedom from being forced to live by another's beliefs. We are called to listen to our individual consciences in matters of moral decision-making, and to respect other people's rights to do the same. In fact, 99 percent of sexually active Catholics have used a modern contraceptive banned by the Vatican.<sup>1</sup> We cannot and do not presume to tell others how best to listen to their own consciences as they make important decisions about whether or when to have children. Doing so would undermine the consciences of women who seek family planning services. Religious freedom at base is an expansive rather than a restrictive idea. It is not about telling people what they can and cannot believe or practice, but giving people the space to follow their own conscience in what they believe or practice. The protections extend to one's personal religious beliefs and practices, but they do not give entire institutions or individuals license to obstruct or coerce the exercise of another's conscience. Neither the freedom of conscience nor the freedom from religion should be misconstrued as extending these protections to institutions.

Respect for individual conscience is at the core of Catholic teaching. As such, allowing religious institutions and organizations to dictate the medical care available to their employees would encroach on this respect for conscience and should not be codified into federal law.

### **The Exemption and Current Accommodation**

Given this respect for individual conscience, we restate our previous concerns in earlier comments on the subject and call for the complete rescission of the exemption for "religious institutions" from the rule. Additionally, we ask the Departments to refrain from expanding the existing accommodation, to better ensure contraceptive access is available to all employees of religious organizations and universities.

Allowing religious institutions to deny contraceptive coverage and expanding the current accommodation to appease more objecting religious organizations and universities would:

- Leave too many women without affordable access to the healthcare they need;
- Constitute state-sponsored discrimination by denying some women, simply on the basis of where they work, equal access to contraceptive coverage that is guaranteed to others;
- Represent an affront to religious freedom by allowing certain elements of particular religions to trample the beliefs and practices of individual women workers; and
- Fly in the face of Catholic ideals of conscience, worker's rights and social justice by leaving some women out of this important benefit.

First, the exemption for "religious institutions," allowing them to outright refuse to cover contraception is wrong as it provides no recourse for affected employees and eliminates all access to this essential healthcare for the many workers of churches, diocesan offices, convents and certain schools. The exemption for religious institutions goes far beyond any intention to protect conscience rights for every individual.

Religious liberty and conscience protections are meant for individuals. The Religion Clauses of the First Amendment prohibits the exercise of religion that unduly restricts other persons in protecting their own interests that the law deems compelling. The Religious Freedom Restoration Act (RFRA) should not allow employers' religious beliefs to trump those of their employees. In fact, such exercise is prohibited by RFRA, which does not permit this imposed burden on the employees of a religious institution.

The women who work for religious institutions, as well as the spouses and dependents that are covered by an employee's policy, deserve the same access to these services that the Departments have provided for other workers. All deserve to be included—not excluded—in this important step forward toward affordable, comprehensive care. While the administration has proclaimed the accommodation balances the benefit of coverage to contraceptives for employees and the objections of certain employers' to providing contraceptive coverage, it is imperative that the benefit is ensured to the employees of religious institutions who are now excluded entirely.

Granting entire institutions the rights of conscience that should be left to individuals is an affront to the Catholic ideals of conscience, worker's rights, social justice and religious freedom. These regulatory acrobatics serve only the interests of institutions and demonstrate a profound disregard for individual employees, who, unlike institutions, have tangible healthcare needs, religious liberty rights and deserve government protection for both.

### **Do Not Expand the Existing Accommodation for Religious Organizations**

In addition, as you consider alternate procedures to ensure access to contraceptive coverage for employees at religious organizations, we urge you to correct the current, misplaced deference to the false "conscience" claims of institutions rather than the actual conscience rights of individuals, and to avoid implementing any policies that would continue this dangerous trend. Instead, we ask that you prioritize the human impact of any accommodation, and respect the consciences of all individual employees—whether employed by secular organizations, "religious institutions" or "religious organizations"—by providing them with equal access to no-cost contraception.

Unlike the exemption, the existing accommodation does not violate RFRA, as the objecting religious organizations claim. The law simply affirms that government may not interfere with a person's religious exercise unless there exists a compelling government interest, and requiring the government further that compelling interest by the least restrictive means. It is difficult to imagine a less restrictive means than the objecting organizations publically assert their objection to providing the benefit to their employees. The requirement to complete a simple form stating this fact does not substantially burden the exercise of religion. Moreover, objecting to the form in effect denies employees the ability to access contraceptive coverage at all. This denies the employees' of these religious organizations of their freedom from religion and undermines real religious liberty, while condoning discrimination from these religious organizations toward their employees. This is not protection of religious liberty.

The government has already recognized that the birth control benefit furthers a legitimate and compelling interest in the health of female employees. The experience of Catholic and non-Catholic women employees demonstrates the government has an additional compelling interest in protecting the religious freedom of these employees regardless of their faith. The decision to utilize or not utilize contraceptive coverage should be up to each individual, according to her conscience and personal beliefs, not subject to the beliefs of her employers or those seeking to impose their ideologies on others.

Allowing some employers to dictate what services their employees may access does not respect the individual capacities of women to form their individual conscience, nor does it respect their right to make their own decisions about what is best for their own health, and that of their families. This deference for the primacy of conscience extends to all women, regardless of their employers, and to their personal decisions about family planning. The final regulation regarding the "accommodation" should similarly defer to the consciences of individual employees and ensure that their individual beliefs and decision-making abilities regarding contraceptive use are neither obstructed nor coerced.

The regulations currently in place exempt employers at certain “religious institutions” from covering contraception while providing no recourse for these affected employees. The existing accommodation attempts to appease the demands of objecting religious organizations and provides a solution for affected employees at religious organizations to ensure coverage for contraception. To expand and further complicate the accommodation would make it more difficult for more women to obtain coverage and would deny employees equal access to the critical preventive services the government has guaranteed to employees at all other places of employment. Even if one woman finds her conscience trumped because of the Departments’ rules, that would be one too many.

Out of respect for individual conscience, religious liberty, social justice, worker’s rights and the human dignity of each person, we urge you not to alter the accommodations in response to false claims of RFRA violations. We urge you not to impose additional burdens on women by implementing affirmative enrollment for contraceptive plans for employees at religious organizations.

### **Estimating the Impact on Women**

Coverage for the full range of FDA-approved contraceptive methods is essential for allowing women to make their own decisions about which option is best for them, no matter their circumstances. The purpose of the ACA mandate was to ensure affordable, accessible, meaningful and stable access to contraceptive services. The exemption does nothing to achieve this purpose, and expanding the accommodation to further conform to religious organizations’ misguided perception of religious liberty will similarly fail to fulfill this purpose.

The Departments have deemed contraception and family planning services an integral component of women’s healthcare. Expanding access to contraception by making it more affordable does make a difference in the lives of many women and their families. Each woman’s ability to prevent unintended pregnancies, regulate health conditions, prevent sexually transmitted diseases and, in some cases, to avoid potentially life-threatening pregnancies, matters. There is no acceptable religious or political justification to the contrary.

More than 515,000 full-time and 220,000 part-time employees at Catholic hospitals and their dependents should be able to expect the same access to contraceptive coverage as other workers guaranteed by law.<sup>2</sup> The hundreds of thousands of employees at the 251 Catholic colleges and universities in the United States also deserve such access. The workers at Catholic Charities, at business and nonprofits large and small, both secular and religious, all deserve equal respect for their consciences and their ability to make their own healthcare decisions without employer interference. Each of these workers potentially stands to lose access to such coverage if the Departments do not ultimately ensure that their rights are always considered first and foremost, rather than continuing to bend to the will of unappeasable litigants.

Many women who utilize birth control for both family planning and healthcare reasons, will be left out of this important benefit should there be any expansion of the accommodation. Any changes to the accommodation should ensure seamless and comprehensive coverage for contraceptive services and counseling guaranteed for employees at any other organization in the US. Failing to do so would impose a burden on women employees’ rights that would be immediate, excessive and extreme. We are hopeful that the Departments will not impose undue burdens such as these, and that the federal government will ensure that all employees, Catholics and non-Catholics alike, will be able to listen to their consciences and have their religious liberty protected in turn.

## Conclusion

The majority of Catholics support equal access to contraceptive services and oppose policies that impede upon that access. In addition to the vast majority of Catholics in the US who support access to these services, 99 percent of sexually active Catholic women in the US have used a modern contraceptive method at some point in their lives.<sup>3</sup> This support for the full range of comprehensive services is unsurprising as restrictions such as refusal clauses or prohibitive costs affect Catholics just as often as non-Catholics.

Coverage for contraceptive services and counseling demonstrates sound judgment about the common good and complements our faith's social justice tradition. As Catholics, we are called to show solidarity with and compassion for the poor. Eliminating copayments for a full array of family planning methods makes these services more affordable for working women in the United States and allows greater access to the healthcare services that are best for them and their families.

The final exemption for "religious institutions" already leaves too many women without affordable access to the healthcare they need. We again request this exemption be eliminated altogether. Furthermore, the Departments should not compound earlier mistakes by expanding the accommodation for religious organizations, secular institutions, religious insurers or other entities in a way that would impose additional barriers and leave more women behind.

We ask that the Departments not grant institutions and organizations a free pass to trample employees' consciences and religious freedom. Instead, we hope that you will demonstrate a commitment to the common good by protecting the individuals who stand the most to lose. Barring the complete rescission of the exemption for religious institutions or the accommodation for "religious organizations," we hope that you will indeed ensure contraceptive access is "affordable, accessible, meaningful and stable,"<sup>4</sup> and that religious liberty is protected for all employees. It is the impact on employees whose health needs and rights to conscience and religious liberty we hope the Departments will consider first and foremost when issuing final rules on these matters.

Respectfully,



Jon O'Brien  
President

---

<sup>1</sup> National Survey of Family Growth, <http://www.cdc.gov/nchs/data/nhsr/nhsr062.pdf>, October 2012.

<sup>2</sup> Catholic Health Association of the United States, "Catholic Health Care in the United States," January 2016.

<sup>3</sup> National Survey of Family Growth, <http://www.cdc.gov/nchs/data/nhsr/nhsr062.pdf>, October 2012.

<sup>4</sup> Federal Register, Vol. 77, No. 55, March 21, 2012, 16507.